



290 South Main Street, #817 • Sebastopol, CA 95472 • US@ncriverwatch.org

**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**

August 6, 2013

Kevin J. Lunny
Drakes Bay Family Farms
Owners/Managing Agents
Drakes Bay Oyster Company
17171 Sir Francis Drake Blvd.
Inverness, CA 94937

**Re: Supplemental Notice of Violations Under the Clean Water Act
And Intent to File Suit**

To: Owners and Managing Agents of Drakes Bay Oyster Company:

NOTICE

This Notice is provided on behalf of California River Watch ("River Watch") in regard to violations of the Clean Water Act ("CWA") 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at the Drakes Bay Oyster Company industrial facility located at 17171 Sir Francis Drake Boulevard in Inverness, California. Notice is being sent to you as the responsible owners, operators and/or managers of this facility. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from Drakes Bay Oyster Company into Drakes Estero.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under CWA § 505(a). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the state in which the violations occur.

By this Notice, River Watch is providing statutory notification to Drakes Bay Oyster Company, hereafter referred to as the "Discharger" of continuing and ongoing violations of "an effluent standard or limitation", and/or "an order issued by the Administrator or a State

with respect to such standard or limitation" under CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board, San Francisco Bay Region's Water Quality Control Plan ("Basin Plan") as exemplified by the Discharger's illegal discharge of pollutants from a point source to waters of the United States without a National Pollution Discharge Elimination System ("NPDES") permit.

The CWA regulates the discharge of pollutants into navigable waters. The statute is structured in such a way that all discharge of pollutants is prohibited with the exception of several enumerated statutory exceptions. One such exception authorizes a polluter who has been issued a NPDES permit pursuant to the CWA, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the CWA § 301(a), 33 U.S.C. § 1311(a) prohibition. Without a NPDES permit, all surface and subsurface discharges from a point source to waters of the United States are illegal.

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify:

1. The specific standard, limitation, or order alleged to have been violated.

River Watch hereby notices the Discharger that it is not in possession of a NPDES permit allowing the discharge of pollutants from the Drakes Bay Oyster Company facility including numerous point sources within the facility site including the seawater intake and discharge system, outfall pipes, pump system, hatchery facility, and shellfish washing operations, to waters of the United States as required by CWA § 301(a), 33 U.S.C. § 1311(a), CWA §§ 402(a) and 402(b), 33 U.S.C. § 1342(a) and 1342(b).

The Discharger, operating as an animal aquiculture and shellfish food preparation facility, covered under SIC Code 0273 (Animal Aquaculture) and SIC Code 2092 (Prepared Fresh or Frozen Fish & Seafoods), is required to be covered by the General Industrial Storm Water Permit, NPDES Permit No. CA S000001, State Water Resources Control Board, Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ ("General Permit"). The General Permit requires the implementation of best management practices (BMPs) that will reduce or eliminate discharges of pollutants from stormwater. The General Permit also requires the preparation, implementation, review and update of an adequate Storm Water Pollution Prevention Plan ("SWPPP"), the elimination of all non-authorized storm water discharges, and the development and implementation of an adequate monitoring and reporting program for a facility and its operations. The SWPPP must identify potential pollutants on the site, the source of those pollutants, and the means to manage those sources to reduce storm water pollution.

River Watch contends the Discharger has failed and is failing to comply with the terms and conditions of the General Permit for the Drakes Bay Oyster Company facility. Failure to obtain coverage under the General Permit is a violation of CWA § 402(p), 33 U.S.C. § 1342(p).

2. The activity alleged to constitute a violation.

River Watch has set forth below narratives describing with particularity the activities leading to violations. In summary, the CWA requires that all discharges of pollution from a point source to a water of the United States without a NPDES permit are prohibited. River Watch alleges the Discharger is discharging pollutants including biological materials and polluted wastewater from the Drakes Bay Oyster Company facility and various point sources within the facility site, to waters of the United States, including Drake's Estero.

3. The person or persons responsible for the alleged violation.

The entity responsible for the violations alleged in this Notice is Drakes Bay Oyster Company identified throughout this Notice as the "Discharger".

4. The location of the alleged violation.

The location of the various violations alleged are identified in the BACKGROUND section of this Notice as well as in records either created or maintained by or for the Discharger with regard to the Drakes Bay Oyster Company facility in Inverness, California which relate to the Discharger's activities on the facility site.

5. The date or dates of violations or a reasonable range of dates during which the alleged activities occurred.

Disposition, discharge and release of pollutants from the Drakes Bay Oyster Company facility in Inverness has been ongoing for a number of years. The CWA is a strict liability statute with a 5-year statute of limitations; therefore, the range of dates covered by this Notice is August 1, 2008 through August 1, 2013. River Watch will from time to time supplement this Notice to include all violations which occur after the date of this Notice. The majority of the violations identified in this Notice such as discharging pollutants to waters of the United States without a NPDES permit, failure to obtain a NPDES permit, failure to implement the requirements of the CWA, and failure to meet water quality objectives are continuous, therefore each day is a violation.

Specific dates of violations are evidenced in the Discharger's own records (or lack thereof) or files and records of regulatory agencies including the Regional Water Quality Control Board, San Francisco Bay Region ("RWQCB") and records found on the State Water Resources Control Board GeoTracker website related to the Inverness facility.

6. The full name, address, and telephone number of the person giving notice.

The entity giving notice is California River Watch, 290 S. Main Street,, #817, Sebastopol, CA 95472 – a nonprofit corporation organized under the laws of the State of California, dedicated to protect, enhance and help restore the groundwater and surface water environs of California including, but not limited to, its rivers, creeks, streams, wetlands, vernal pools, and tributaries.

River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

Sarah Danley, Esquire
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel. 707-528-8175
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BACKGROUND

The Drakes Bay Oyster Company oyster farming facility and operations are located at 17171 Sir Francis Drake Boulevard in Inverness, California on the estuary known as Drakes Estero. Until 2004, Johnson Oyster Company operated a limited version of the mariculture facility now operated by the Discharger. The Discharger purchased the property on which the farming operations take place in 2004, and further developed the property including the installation of unpermitted buildings and structures, a retail shellfish sales facility, an oyster shucking and packing facility, an indoor oyster hatchery facility, two oyster outdoor seed setting tanks, and the placement of oyster cultivation apparatus including a seawater intake and discharge system with outfall pipes into Drakes Estero, a water of the United States. The buildings, hatchery, seawater discharge system, and outfall pipes are all point sources.

Materials from operations at the oyster shucking and shellfish packing facility containing biological waste such as shells, shellfish parts, unwanted shellfish and other pollutants such as bleach, ammonia, other cleaning solutions, as well as packaging wastes (plastic and paper), discharge from an outfall pipe directly into Drakes Estero.

Materials from operations at the oyster hatchery facility containing biological waste in the form of oyster shells, oysters, oyster waste, and single-cell algae used as oyster feed, in addition to water treatment pollutants such as chlorine and sodium hypochlorite, discharge from an outfall pipe directly into Drakes Estero.

In addition, River Watch contends the Discharger is discharging *Didemnum vexillum*, ("D. vex") from point sources within the Drakes Bay Oyster Company site into Drakes Estero, and is helping to propagate D. vex. Currently, 98% of the substrate harboring D. vex in Drakes Estero is owned by the Discharger.

D. vex is a fast-growing sea squirt non- native to the Estero, more than likely arriving from shellfish stock, aquaculture equipment, or boat hulls. Once established in an ecosystem, D. vex can begin to take over and cause crippling of fisheries and significant ecological and economic damage. D. vex reproduces both sexually and asexually; shedding eggs and sperm into the water which drift with the currents but usually settle close to the parents.

Drakes Estero has a flat, muddy bottom with relatively few solid surfaces onto which D. vex would normally be unable to grow. However, the Discharger's infrastructure provides the hard surfaces and habitat D. vex needs in the form of wooden oyster racks, boats, hulls, docks, pilings and the oysters themselves – all point sources. Oyster shells and wooden oyster racks containing D. vex are pulled up onto boats, dislodging D. vex which breaks off into fragments which can then establish new colonies in the area. When the oysters are processed, fragments of D. vex are discharged from the outfall back into Drakes Estero which also can allow the fragments to form new colonies. These fragments discharged from the Discharger's operations are biological waste and therefore pollutants under the CWA. Since being established on these hard surfaces within the Drakes Bay Oyster Company site, D. vex has spread to the eelgrass and the Estero floor. Eelgrass is an ecosystem engineer, filtering sediment out of the water, and providing food to many marine animals. It provides a nursery for herring and other like species which lay their eggs in the eelgrass. The eelgrass may be at risk for being smothered by D. vex.

River Watch members have a vital interest in bringing the Discharger's operation of its Inverness facility into compliance with the CWA. Without the implementation of the relief requested below, River Watch believes the adverse effects of the Discharger's violations of the General Permit and the CWA will continue.

VIOLATIONS

River Watch contends that between August 1, 2008 and August 1, 2013 the Discharger violated the CWA, the Basin Plan and the Code of Federal Regulations by discharging pollutants from the Drakes Bay Oyster Company facility in Inverness to waters of the United States without an individual NPDES permit, or in violation of the General Permit. Furthermore, River Watch contends these violations are continuing.

The violations as set forth in this Notice affect the health and enjoyment of members of River Watch who reside, work and recreate in the affected area. The members' health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as identified in this Notice.

REMEDIAL MEASURES REQUESTED

River Watch believes that implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and reduce the biological impacts of its non-compliance upon public health and the environment surrounding the Drakes Bay Oyster Company facility:

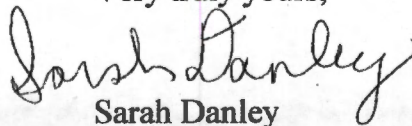
1. Application for an individual NPDES discharge permit or application for coverage under the General Permit;
2. Immediate cessation of all unpermitted discharges of pollutants including *Didemnum vexillum*, shells, shellfish parts, unwanted shellfish, bleach, ammonia, other cleaning solutions, packaging wastes (plastic and paper) oysters, oyster waste, single-cell algae used as oyster feed, chlorine, and sodium hypochlorite, from the Inverness facility.

CONCLUSION

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under CWA § 505(a) against the Discharger for the violations identified herein.

During the 60-day notice period, River Watch is willing to discuss effective remedies for these violations. If the Discharger wishes to pursue such discussions, it is suggested that a dialog be initiated soon so that discussions may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when that notice period ends.

Very truly yours,



Sarah Danley

SD:lhmm

cc: Administrator
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